



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 28, 1995

Ms. Ann Diamond
Assistant District Attorney
Tarrant County
Office of the Criminal District Attorney
Justice Center, 401 West Belknap
Fort Worth, Texas 76196-0201

OR95-103

Dear Ms. Diamond:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 27706.

Tarrant County (the "county") has received a request for information relating to a 1992 incident in which several gang members allegedly assaulted a jail inmate. Specifically, the requestor seeks "a copy of the original investigation report to include the names of the attackers and the sanctions, if any, that was [sic] imposed upon them." You have submitted the requested information to us for review. You claim that sections 552.102 and 552.108 of the Government Code except the requested information from required public disclosure.

We first address your assertion of sections 552.101 and 552.102 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.102 excepts from disclosure "information in personnel files, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Section 552.102 of the Government Code protects personnel file information only if its release would cause an invasion of privacy under the test articulated for section 552.101 by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). See *Hubert v. Harte-Hanks Tex. Newspapers*, 652 S.W.2d 546 (Tex. App.--Austin 1983, writ ref'd n.r.e.). Under the

Industrial Foundation case, information may be withheld on common-law privacy grounds only if it is highly intimate or embarrassing and is of no legitimate concern to the public. Generally, the public has a legitimate interest in the job qualifications and performance of public employees. See Open Records Decision No. 470 (1987) at 5.

We have examined the records submitted to us for review. They appear to have been generated in connection with the investigation of a suspected assault that occurred in the county jail in 1992. The submitted records do not contain any information that is intimate or embarrassing. Moreover, the jail's investigation is of legitimate public concern. Accordingly, common-law privacy does not protect the requested information from required public disclosure.

Section 552.101 also excepts from disclosure information protected by confidentiality statutes. The Medical Practice Act, V.T.C.S. article 4495b, protects some medical information. Section 5.08(b) of the Medical Practice Act provides that "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician" are confidential. Records must be kept confidential under article 4495b only if they are actually prepared or maintained by a physician or under the supervision of a physician. Attorney General Opinion JM-229 (1984) at 2; Open Records Decision Nos. 578 (1990) at 2; 343 (1982) at 1.

The records you submitted for review contain three documents that may have been prepared by a physician or under the supervision of a physician. Two of these documents relate to the requestor and, thus, may be withheld from the requestor only if they were prepared by or under the supervision of a physician and that physician determines that releasing the document to the requestor "would be harmful to the physical, mental, or emotional health" of the requestor. Article 4495b, § 508(k), V.T.C.S.; Open Records Decision No. 607 (1992) at 4. The other document relates to an individual other than the requestor and, thus, must be withheld if it was prepared by or under the supervision of a physician, unless the county receives an adequate consent to release the records to the requestor.

Next, we address your contention that section 552.108 of the Government Code excepts the requested information from required public disclosure. Section 552.108 excepts from disclosure the following information:

- (a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime
- (b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution.

When applying section 552.108, this office distinguishes between information relating to cases that are still under active investigation and other information. Open Records Decision No. 611 (1992) at 2. In cases that are still under active investigation, section 552.108 excepts from disclosure all information except that generally found on the first page of the offense report. *See generally Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Otherwise, when the "law enforcement" exception is claimed, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how release would unduly interfere with law enforcement. Open Records Decision No. 434 (1986) at 3 (citing *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977)). Whether information falls within the section 552.108 exception must be determined on a case-by-case basis. *Id.* at 2.

You advise us that the investigation at issue here is no longer active. You claim, however, that releasing the requested information will unduly interfere with law enforcement. Specifically, you believe that the request for information is a prelude to a "frivolous" and "harassing" lawsuit against the county. In addition, you argue that releasing incident reports discourages proper reporting and investigation of jail incidents and diverts law enforcement resources from law enforcement to producing documents.

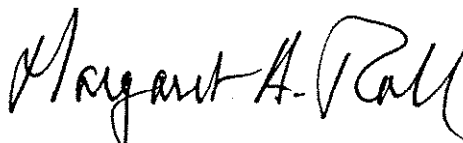
We note that the Open Records Act prohibits a governmental body from considering the motives underlying a person's request for information. *See* Gov't Code § 552.222. Accordingly, the fact that the requestor may seek the incident report for litigation purposes has no bearing on the information's public availability.¹ In addition, we believe that the fact that the jail may under-report or under-investigate jail incidents in anticipation of "frivolous" or "harassing" litigation is not a sufficient ground for withholding information under section 552.108. We assume that the jail has a duty to accurately and fully report jail incidents and may even have an interest not prescribed by law in doing so. Finally, the fact that compliance with the Open Records Act may divert the jail's resources is immaterial to the applicability of section 552.108. We remind you that compliance with the Open Records Act is mandated by law, Gov't Code §§ 552.221, .301, and that noncompliance may result in criminal penalties, Gov't Code § 552.353.

¹Although a governmental body is prohibited from considering the motives of the person requesting information, section 552.103 permits a governmental body to withhold from any requestor information related to pending or reasonably anticipated litigation. You did not, however, assert that section 552.103 excepts from disclosure the information requested in this case. Thus, we are not permitted to consider the application of section 552.103. The Open Records Act places on the governmental body the burden of establishing which exceptions apply to particular information and why. If a governmental body fails to raise a particular exception, that exception is waived unless the governmental body shows compelling reasons to withhold the information under that exception. Open Records Decision No. 515 (1988) at 6.

Accordingly, we conclude that you have not demonstrated, nor do the submitted documents demonstrate on their face, that releasing the requested information will unduly interfere with law enforcement. Accordingly, we conclude that the county may not withhold the requested information under section 552.108 of the Government Code. The county must promptly release the requested information in its entirety with the possible exceptions noted above.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Margaret A. Roll". The signature is fluid and cursive, with the first name "Margaret" being more prominent and the last name "Roll" written in a simpler, more direct style.

Margaret A. Roll
Assistant Attorney General
Open Government Section

MAR/GCK/rho

Enclosures: Submitted documents

Ref.: ID# 27706

cc: Mr. Clarence Wayne Haney
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(w/o enclosures)